No. 99.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Brief on Behalf of Plaintiff in Error.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a Corporation),
Plaintiff in Error.

vs.

CORA E. NIXON,
Defendant in Error.

Error to the Circuit Court of the United States, for the District of Washington, Western Division.

J. R. BRODIE & CO., PRINTERS, 401-403 SANSOME ST., S. F.

FILED
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Chas M. Fay
Atty for pltff in error

In the United States Circuit Court of Appeals, for the Ninth Circuit.

The Pacific Mutual Life Insurance Company of California (a Corporation), Plaintiff in Error, vs. Cora E. Nixon, Defendant in Error.	}

Statement of Case.

Defendant in Error, as plaintiff, filed her complaint in the Court below against the Plaintiff in Error, as defendant, for the recovery of the sum of ten thousand dollars, claimed to be due upon a policy of life insurance issued by the defendant below, Plaintiff in Error here, upon the life of her husband, now deceased.

The original pleadings were all superseded by an amended complaint filed September 15, 1892, found in the record commencing at bottom of page 20; the answer to the Amended Complaint, commencing at page 24 of the record; and the reply thereto, commencing at page 32 of the record.

No question of jurisdiction is raised. It appears without dispute, both from the pleadings and the evidence, that a contract of life insurance was entered into September 1st, 1889, between the plaintiff in error and Thomas Lea Nixon, the husband of this defendant in error, whereby plaintiff, for the considerations mentioned in said contract, insured the life of said Thomas Lea,

Nixon, and upon the conditions named in the contract agreed to pay to said Thomas Lea Nixon, or his assigns, on the first day of September, 1909, the sum of $10,000; or, if he should die in the mean time, then to pay said amount to Cora E. Nixon, this defendant in error, plaintiff below. See *Policy*, p. 69; and *Application*, p. 76.

The contract of insurance was in two parts, the first being the application made by said Thomas Lea Nixon, dated August 15th, 1889, a copy of which is entered in the record between pages 76 and 77, in which it is declared and agreed by and on the part of said Thomas Lea Nixon among other things as follows:

"That only the officers at the home office have author-
"ity to determine whether or not a policy shall issue on
"any application, and that they act only on the state-
"ments and representations in the applications, and that no
"statements, representations or information made or given
"by or to the person soliciting or taking the application for
"a policy, or to any other person, shall be binding on the
"company, or in any manner affect its rights, unless
"such statements, representations or information be re-
"duced to writing and presented to the officers of the
"company at the home office in this application."

"It is hereby declared and warranted that all the state-
"ments and answers made in this application, including
"the answers to questions to be asked by agent, and the
"questions to be asked by the medical examiner are com-
"plete and true, and that they, together with this decla-
"ration and agreement, constitute an application to the
"Pacific Mutual Life Insurance Company of California
"for a policy of insurance, and are offered as a considera-

" tion for the policy hereby applied for. And it is agreed
" that there shall be no contract of insurance until a
" policy shall have been issued and delivered by the said
" company, and the first premium thereon paid while the
" person proposed for insurance is living and in the same
" condition of health described in this application; and
" that if said policy be issued the declarations, agree-
" ments and warranties herein contained shall constitute
" a part of the contract, and the contract of insurance
" when made shall be held and construed at all times
" and places to have been made in the City of San Fran-
" cisco, in the State of California."

" It is agreed that the policy issued upon this applica-
" tion shall become null and void if the premium thereon
" is not paid as provided therein, and should such policy
" become null and void by reason of the non-payment of
" premium all payments previously made shall be for-
" feited to the company, except as therein otherwise pro-
" vided."

And was so pleaded in the Answer (pages 26 and 27), and which averments were not denied in the reply, but were and are proved by and upon the face of the application aforesaid.

The second part of the contract consisted of the policy, found at pages 69 to 73 of the record, dated September 1st, 1889, which declares on its face that it was made by the Pacific Mutual Life Insurance Company of California " in consideration of the representations made to them
" in the application therefor, and of the agreements
" therein contained, which application is made a part of
" this contract, and of the sum of five hundred and

" seventeen dollars and eighty cents, and of the annual " payment of a like amount, to be paid on or before " twelve o'clock noon of the first day of September in " every year during the continuance of this policy." And on the face of said policy it was further provided " that " after the payment of the first premium thereon a grace " of thirty days for the payment of premium shall be al- " lowed, but only in case the same is paid during the " lifetime of the insured aforesaid;" and also " that no " alteration or waiver of the conditions of this policy " shall be valid unless made in writing at the office of " said company in San Francisco, and signed by the " President or Vice-President and Secretary or Assistant " Secretary." All of which was duly pleaded in the Answer (pages 28 and 29) and admitted (by not being denied in the Reply), and all of which appears upon the face of the policy so appearing in the record as aforesaid.

Plaintiff below alleged faithful performance of all the conditions of the contract on the part of the insured (p. 23). This was denied by the defendant (p. 29, paragraph 10), and in paragraph 11 (same page) the defendant specially averred that the premium falling due September 1st, 1890, was never paid, nor any part thereof, and that the same was not tendered within the thirty days grace, by reason whereof the policy became null and void according to the terms of the contract.

This averment of non-payment or tender was denied in the Reply; also denied that policy became void (p. 33, paragraphs 2 and 3). Plaintiff then for further reply alleged as follows (see pp. 33 and 34):

"That the said defendant company by its duly author-
" ized agents at the expiration of the thirty days grace
" following the first day of September, 1890, duly and
" fully waived the payment of the second annual pre-
" mium as to the time when such payment should be
" made by the terms of the said policy, and all other con-
" ditions therein, and extended the time of the payment
" thereof, as hereinafter stated, and specially authorized
" and requested the said Thomas L. Nixon to pay said
" second premium during the month of October, 1890,
" and did on or about said date notify and declare to said
" Nixon that if said premium should be paid at any time
" during said month of October the same would be ac-
" cepted by said company as if paid in accordance with
" the terms of said policy."

" That, in reliance upon and in pursuance of said re-
" quest, extention and notification, the said Nixon, through
" this plaintiff thereupon immediately undertook to pay
" said second premium.

" That defendant had no office or place of business in
" Pierce County, in which the insured then lived, and
" the local agent of defendant was then absent from said
" county and so remained absent till after said month of
" October.

" That, after repeated efforts, being unable to find said
" agent or other person to whom said premium might be
" paid, up to the 31st day of October, 1890, the same,
" to-wit: the sum of $517.80, was on said date forwarded
" and paid to said company through one Edward C. Frost,
" the general agent residing at Portland, Oregon, who was
" duly authorized to receive the same as such, and the

" same duly applied to the payment of said premium, and
" that said defendant has ever since then kept and retained
" said sum of $517.80, and does so now.

" Wherefore plaintiff says that defendant has waived
" all conditions in said policy with reference to the pay-
" ment of said premium in any wise and all right or claim
" or forfeiture, if any it ever had, and is, and ought to be
" estopped from claiming any forfeiture under said policy."

(The subsequent "further reply" was afterwards stricken out by the Court—pages 103–4—and no point attempted to be made under it.)

Upon the trial no claim was made, or evidence offered showing that an attempt was made to pay or tender the premium falling due September first, 1890, until after the expiration of the thirty days of grace provided in the policy, so that the sole issue presented to the Court and jury below was, whether or not there had been a waiver of time on the part of the defendant below (plaintiff here) and a payment of the premium, and acceptance of the the same *by the company*, after its maturity, and the days of grace provided for in the contract.

The jury found upon that issue in favor of the plaintiff below (defendant here). Motion in arrest of judgment and for new trial was made upon the grounds, among others, of insufficiency of the evidence to justify the verdict; that the verdict was not supported by the evidence; that it was contrary to the evidence and contrary to law (pp. 49–50). Which motion was by the Court denied, and the ruling of the Court upon that motion is assigned as error and relied upon here. The evidence bearing upon that issue will be cited in our brief of argument upon that point.

Assignment of Errors.

I.

The Court erred in admitting in evidence the policy of insurance in this case, for the reason that the contract of insurance herein sued on was in two parts, neither of which disclosed the entire contract, but both parts are necessary, and required to show the entire contract. (See pages 59 to 61 and Exhibit at p. 69.)

II.

The Court erred in not sustaining defendant's motion for a non-suit made at the close of the plaintiff's evidence, for the reason that there was no evidence then in the record upon which the jury could find a verdict for plaintiff. (See pages 64 and 101-102).

III.

The Court erred in sustaining objections to the questions propounded to the witness for the defendant, William M. Fleming; as to a conversation between him and Thomas Lea Nixon. (See p. 64).

IV.

The Court erred in refusing to permit the defendant to prove by said witness that "within thirty days after the
" premium fell due, within the days of grace allowed,
" the witness, then an agent of the company, called on
" Mr. Nixon and had a conference with him in his office,
" in which Mr. Nixon stated that he did not intend to pay
" the premium, but proposed to let the policy lapse."
(See p. 65).

V.

The Court erred in refusing to give to the jury the following instructions as prayed by defendant:

" The application for insurance was written and signed " in this State, and was made by said Thomas Lea Nixon, " dated August 15, 1889, and provided that the policy, if " one should be issued thereon, should bear date on and " run from the 1st day of September, 1889. This appli- " cation was addressed to the defendant, The Pacific " Mutual Life Insurance Company of California, a cor- " poration organized and existing under the Laws of the " State of California, and having its principal place of " business in San Francisco, in that State, and the appli- " cation provided upon its face that if the propositions " for life insurance therein contained should be accepted " and a policy issued thereon, the contract of insurance " should be held and construed at all times and places to " have been made in the City of San Francisco, in the " State of California. The application was accepted and " the policy issued and made in San Francisco, in the " State of California, and bore date September 1st, 1889, " and by the terms of the contract itself became and was " a California contract, and the rights of the parties " thereunder were governed by the terms of the contract " and the laws of the State of California."

VI.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

" It is further provided in this application for insurance, " and became a part of the contract, that all the declara- " tions, agreements and warranties therein contained shall

" constitute a part of the contract, and that the applica-
" tion with its declarations, agreements and warranties
" was offered as a consideration for the policy applied for,
" the policy itself expressing on its face that it was made
" in consideration of the representations made in the ap-
" plication therefor, and the agreements therein contained,
" which application is made a part of the contract; and of
" said sum of five hundred seventeen and 80-100 dollars
" and the annual payment of a like amount to be paid on
" or before 12 o'clock noon, on the 1st day of September
" in every year during the continuance of the policy."

VII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"It is admitted that the contract of insurance was duly
" made and executed, containing all of the provisions
" hereinbefore stated; that the first premium thereon was
" paid and the policy delivered, and the only issue in this
" case is as to whether or not the second premium, which
" fell due on the first day of September, 1890, was paid
" according to the terms of the policy or contract."

VIII.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant:

"If you should find from the evidence that it was so
" paid, and that the insured, Thomas Lea Nixon, com-
" plied with the terms and conditions of the policy on
" that behalf on his part, then you will find for the plain-
" tiff; but on the other hand, if you find from the evidence
" that the premium which fell due on the 1st day of

" September, 1890, was not paid on or before 12 o'clock
" of that day, or within the thirty days grace, to wit: the
" next succeeding thirty days thereafter, according to the
" terms of the policy and within the lifetime of the in-
" sured, then it is your duty to find for the defendant."

IX.

The Court erred in refusing to give to the jury the following instructions as prayed by the defendant:

"I charge you that under the law of the contract, to
" wit: the Statute and the Laws of California, the pro-
" vision made in this contract for prompt payment of the
" premium when due was a warranty that the premium
" should be so paid, and that a failure of this provision
" rendered the contract void under the Statutes of Cali-
" fornia, as well as under the provisions of its own terms
" found on its face. This provision was one which the
" parties had a right to make, and having made it, it be-
" came of the essence of the contract, and was binding
" upon the contracting parties and upon the beneficiary
" under the policy. The time within which the payment
" was to be made was also of the essence of the contract
" and sickness or disability would not constitute an excuse
" for non-payment which operated to defeat the lapse of
" the policy, or prevent it becoming void for non-payment."

X.

The Court erred in refusing to give to the jury the following instruction, as prayed by defendant.

"If there was a failure to pay this premium within the
" time fixed by the contract it defeats the plaintiff's right
" to recover in this action; the policy lapsed and became

" void by reason of that non-payment, and no promise of
" an agent to accept the premium after the time when it
" should have been so paid, would operate to renew the
" policy, even the act of a person holding an agency of
" this plaintiff in receiving, receipting for and temporarily
" retaining the amount of the premium, past due and for
" the non-payment of which the policy had lapsed by its
" own terms, would not operate as a waiver so as to re-
" new the policy or entitle the plaintiff to recover there
" on."

XI.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows (p. 132; Exception p. 54):

" But an actual payment of the money so that the full
" amount was received by the company when paid by the
" plaintiff in this case is a payment of that premium; and
" if received and retained by the company would be ex
" actly equivalent to payment within the period provided
" in the contract when it should have been paid. In
" other words, a payment is as much a payment made
" after the date when it is due and payable, provided it
" was received and retained by the company, as if it had
" been made before that time."

XII.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows (pp. 132–133; Exception pp. 54 and 55):

" Now, Mr. Frost appears by the pleadings and the
" evidence to have been acting for this company, and

"whatever he did within the scope of his authority to "represent the company will be regarded as the act of the "company. Acts of his unauthorized and outside of the "scope of his authority as an agent of the company, are "not binding upon the company, unless he assumed to "act for the company and the company knew of his action "and received and retained the benefit of his action, and "failed promptly to give notice to the plaintiff that his act "was not indorsed or approved by the company. If he re-"ceived money from the plaintiff for the company which "he was not authorized at the time to receive, and yet "retained it and applied it to the use of the company, "with the knowledge of his superior officers in the com-"pany, and if they failed to notify the plaintiff that the "payment was not approved or received by the company, "and failed to return the money, if they received it, then "it would be by reason of the failure of the company to "repudiate his act promptly, equivalent to an authorized "act and be regarded as the ratification of the action of "the agent of the company in a matter in which he was "previously unauthorized."

XIII.

The Court erred in instructing the jury as it did in the last sentence of that part of its instructions which reads as follows (p. 133; Exception pp. 55–56):

"If the plaintiff sent the amount of the second pre-"mium on this policy to Mr. Frost at Portland, to be "applied as a payment of the second premium on this life "insurance policy, Mr. Frost would have no right to "receive and retain the money for any other purpose than "as a payment on the policy as the second premium,

" according to the instructions sent with the money. If,
" however, being authorized, he simply retained the money
" temporarily and promptly notified the plaintiff that it
" had not been applied in payment of the premium, the
" company would not be bound by his act in receiving
" the money. If, however, he retained the money, after
" being requested, or notified by the plaintiff to return it,
" then his assumption in the matter of acting as trustee
" or agent of the plaintiff, would be unwarranted, and, as
" far as he was acting with the knowledge of the manag-
" ing officers of the company, would be binding upon
" them in the same manner as where he acted for the
" company in any other respect."

XIV.

The Court erred in instructing as it did in that part of its instructions reading as follows (pp. 133–134; Exception pp. 56–57):

"Under the particular condition of this case, it is one
" in which promptness and actual good faith was required
" on both sides. It was required of Mr. Frost, if he did
" not intend to apply the money he received in payment
" of this premium to make the policy good, that he
" could give prompt notice. If he did give prompt notice,
" it was incumbent upon Mr. Nixon or Mrs. Nixon, to
" act definitely in the matter of furnishing the additional
" certificates that were required, or notify him that they
" could not or would not furnish them, and call for their
" money to be returned, and if they did not notify Mr.
" Frost, and ask for the return of the money, and it was
" yet retained by Mr. Frost, with the knowledge of his

" superior officers in the company, then it cannot be in-
" sisted that he was acting as Trustee or Agent of the
" plaintiff in holding the money, but it will be regarded
" as money received and retained by the company, and
" bind them to make an application of it as a payment
" in accordance with the original intention and instruction
" of the plaintiff in sending it."

XV.

The Court erred in instructing the jury as it did in that part of its instructions which reads as follows: (p. 134; Exception p. 57):

" Now, it is for you to take into account the testimony,
" the letters and correspondence that has been introduced,
" and decide what effect to give to this evidence, to de-
" termine whether the company received this money or
" not, and whether it has retained it after it should have
" returned it, in case the company declined to receive it
" as payment; and as you decide that question, you will
" make up your verdict for or against the plaintiff."

XVI.

The Court erred in overruling defendant's motion for a new trial herein.

XVII.

The Court erred in rendering judgment herein, in favor of the plaintiff and against the defendant.

Brief of Argument.

I.

Under our first assignment of error we submit, that the paper offered by plaintiff below to make out her case,

(the Policy, p. 69 of the record), showed upon its face that it was only a part of the contract. It was offered for the purpose of proving not only the fact that there was a contract, but also the terms and conditions of that contract. It is a rule of law of such universal application, that when a party offers in evidence an instrument necessary to be considered in determining the rights of the parties litigant, he shall offer the whole instument, that the citation of authorities in support of such a proposition would seem to be not only unnecessary but presumptuous. In this case there was no excuse for the refusal to offer the whole, for while the part not offered was in the posession of the other party, it was present in Court and tendered to plaintiff's counsel so that it might be offered in connection with the policy, and counsel and the Court notified that if the whole was offered, no objection would be interposed. (See record, pages 60 and 82.) And it is no sufficient answer to say that the other part could be offered by the defendant if desired, or that the error was waived by a subsequent offer of the other part of the contract. Defendant was entitled to have the whole contract before the Court at the conclusion of plaintiff's evidence, so that the Court could determine whether it ought to be put upon its defence; and defendant had no opportunity of putting in this or any other evidence until the case in chief had been closed on the part of plaintiff. The ruling of the Court here assigned as error was one which required the defendant to put in the evidence upon which plaintiff relied to make out her case, and was clearly erroneous and subversive of the rights of defendant.

II.

The Court erred in not sustaining defendant's motion for a non-suit, at the close of plaintiff's case.

When this motion was made, (pp. 64 and 101, 102) the plaintiff had closed her case, and the evidence which had been offered and admitted in support thereof was:

First--The Policy, constituting one part only of the contract, (p, 69 *et seq.*) upon the face of which it appeared that the considerations thereof were the warranties contained in the application (which had not been offered) and the payment on or before 12 o'clock noon of the first day of September in each year, of an annual premium of $587.80 (p. 69); that it was issued and accepted upon certain conditions and agreements thereinafter named, (p. 70), one of which was that after the payment of the first premium a grace of thirty days for the payment of premium should be allowed, but only in case the same is paid during the life time of the insured, (p. 71); another of which was that no alterration or waiver of the conditions of the policy should be valid, unless made in writing at the office of the Company in San Francisco, and signed by the President or Vice-President and Secretary or Assistant Secretary, (p. 72).

Second—That the second annual premium was sent at the request of Mrs. Nixon by the Merchants' Bank of Tacoma to Ladd & Tilton's Bank at Portland to be paid to Mr. Frost, the general agent of the company at that place (testimony of Mrs. Nixon, pp. 84 and 85); that this was done on the 31st of October, 1890 (*Id.*, p. 86), *which was 61 days after the premium fell due;* that during October (all of which was after the expiration of the days of

grace), she had made an effort to find Mr. Fleming, the local agent, but without success (*Id.*, p. 86); that the payment was not ordered by her until October 31st, 1890 (*Id.*, p. 89); that the Merchants' National Bank of Tacoma on said 31st of October, in compliance with the request of Mrs. Nixon, telegraphed Ladd & Tilton's Bank at Portland to pay the $517.80 "to Edward C. Frost, Agent, "account of Thomas L. Nixon policy, Friday, 12 o'clock "noon" (see testimony of Davis, cashier, pp. 97 and 98); that the same was paid to Frost, who gave his receipt therefor in the words and figures following (see foot of page 74):

"PORTLAND, Oregon, October 31, 1890.

"Received from Ladd & Tilton, Bankers, five hundred "and seventeen 80-100 dollars for account of Thomas L. "Nixon policy, per telegraphic instructions from Mer-"chants' Natl. Dated Bk. Tacoma, 10, 31, '90.

"$517.80. EDWARD C. FROST, Agent."

(The printed copy gives the date as Oct. 3, but that is a patent typographical or clerical error in the record as appears from the figures below and from the endorsement made at the time by Ladd & Tilton and shown at the head of the next page, as well as by all the testimony in the cause.)

And this is followed by the positive and undisputed testimony of Frost himself, found on the lower half of page 95, that he was not authorized to receive premiums more than thirty days after due.

It will be observed that his receipt is not a premium receipt in form, nor as for premium, but simply "for account," showing upon its face that the act of application was not complete.

This constitutes the entire evidence on the subject of payment in support of plaintiff's case, when she rested. Exhibit C, found at the head of page 74, had not then been admitted, but was ruled out (p. 96). At a later stage of the case during the course of the defense it was admitted without exception. (See p. 115.)

Upon this evidence we submit that it was the duty of the Court, under the law, to have granted the motion for non-suit. True, the case was not as strong at that stage in favor of defendant, as it would have been, if both parts of the contract had been in, and that fact adds force to our position under our first point. But there was enough here to show that the policy had become absolutely void under the terms and conditions of the contract, and that there had been no waiver of those terms and conditions. The very life of the obligation depended upon paying the premium September 1st, 1890, or within thirty days thereafter. No attempt was made to pay it until more than sixty days thereafter. Then the money was paid, not to the company or to any officer who had authority to waive the condition of time, but to a person who was, it is true, an agent of the company who himself swears that he had no authority to receive payment of the overdue premium, and who would not and did not give a premium receipt therefor.

It was a California contract, made and executed in the City of San Francisco. It was not only made upon consideration of the prompt payment of premium, as expressed upon its face, but the granting of a fixed number of days of grace, excluded the right to claim any greater number.

The contract being in writing it was the duty of the Court to construe it, and not to leave it to the construction of the jury.

C. C. P. of Cal. Sec. 2102.

And the Court had no right to insert anything which had been omitted, or omit anything which had been inserted.

C. C. P. of Cal. Sec. 1858.

As was said by the Supreme Court of the United States in New York Life Insurance Co. vs. Statham, (93 U.S. 24-31)**"time is material, and of the essence of the contract. Non-payment at the day involves absolute " forfeiture, if such be the terms of the contract."

Or as was again said by the same Court, reviewing, approving and making other quotations from the case last cited, in Klein vs. Insurance Co. (104 U. S. pages 90, 91 and 92):

" A life insurance policy usually stipulates, first, for the " payment of premiums; second, for their payment on a " day certain; and third, for the forfeiture of the policy " in default of punctual payment. Such are the pro- " visions of the policy which is the basis of this suit.

" Each of these provisions stands on precisely the same " footing. If the payment of the premiums, and their " payment on the day they fall due, are of the essence of " the contract, so is the stipulation for the release of the " company from liability in default of punctual payment. " No compensation can be made a life insurance company " for the general want of punctuality on the part of its " patrons.

" It was said in New York Life Insurance Co. vs.

" Statham (supra), that promptness of payment is essen-
" tial in the business of life insurance. All the calcula-
" tions of the insurance company are based on the hypoth-
" esis of prompt payments. They not only calculate on
" the receipt of premiums when due, but upon compound-
" ing interest upon them. It is on this basis that they
" are enabled to offer insurance at the favorable rates
" they do. Forfeiture for non-payment is a necessary
" means of protecting themselves from embarrassment.
" Delinquency cannot be tolerated or redeemed except at
" the option of the company."

"If the assured can neglect payment at maturity and
" yet suffer no loss or forfeiture, premiums will not be
" punctually paid. The companies must have some effi-
" cient means of enforcing punctuality. Hence their
" contracts usually provide for the forfeiture of the policy
" upon default of prompt payment of the premiums. If
" they are not allowed to enforce this forfeiture they are
" deprived of the means which they have reserved by
" their contract of compelling the parties insured to meet
" their engagements. The provision, therefore, for the
" relief of the company from liability on a failure of the
" insured to pay the premiums when due is of the very
" essence and substance of the contract of life insurance.
" To hold the company to its promise to pay the insur-
" ance notwithstanding the default of the assured in mak-
" ing punctual payment of the premiums is to destroy
" the very substance of the contract. This a Court of
" Equity cannot do. Wheeler vs. Connecticut Mutual
" Life Insurance Co., 82 N. Y., 543. See also the opin-

" ion of Judge Gholson in Robert vs. New England Life
" Insurance Co., 1 Disney (Ohio), 355.

" It might as well undertake to release the assured
" from the payment of premiums altogether as to relieve
" him from forfeiture of his policy in default of punctual
" payment. The company is as much entitled to the
" benefit of one stipulation as the other, because both are
" necessary to enable it to keep its own obligations.

" In a contract of life insurance the insurer and as-
" sured both take risks. The insurance company is bound
" to pay the entire money, even though the party whose
" life is insured dies the day after the execution of the
" policy and after the payment of but a single premium.

" The assured assumes the risk of paying premiums
" during the life on which the insurance is taken, even
" though their aggregate amount should exceed the in-
" surance money. He also takes the risk of the forfeit-
" ure of his policy if the premiums are not paid on the
" day they fall due."

In the case of Cronkhite vs. Accident Insurance Co. of North America (35 Fed. Rep., 26) in the Circuit Court for the District of Colorado a very similar state of facts appeared. At the close of plaintiff's case the defendant moved the Court to instruct the jury to find for the defendant. This would perhaps have been the better practice here had it not been for the fact that the action was upon a California contract, and controlled by California law, and that Section 851 of the Code of Civil Procedure of California seems to prescribe the procedure here adopted in the following language: "An action may be dismissed or
" a judgment of non-suit entered in the following cases:

" * * 5. By the Court upon motion of defendant when upon " the trial the plaintiff fails to prove a sufficient case for " the jury." The difference in the motion is mere matter of form of procedure, the legal effect being practically the same.

The Court granted the motion made, Mr. Justice Brewer delivering the opinion, to which we call the special attention of this Court as being particularly applicable in the present case.

Authorities to the same import as those already cited and from the same and other Courts might be multiplied, but it hardly seems necessary to do so. The plaintiff's proofs showed that neither she or her husband had complied with the terms of the contract, and that as a matter of law she could not recover. There was no matter of fact in the case to go to the jury. To allow such a case to go to them, was to make them pass on a question of law, and to deprive the defendant of the right which it had to have the Judge (and not the jury) determine the law. The non suit should have been granted. To refuse it was to invite the jury to give a verdict where there was no evidence of a fact creating a legal liability.

III.

Our third and fourth assignments of error are proper to be considered together. It was shown that at and during the days of grace upon this premium, the witness Fleming was the special agent of the company, resident at Tacoma, and called upon and had a conversation with the insured in reference to this policy (p. 64). The testimony offered and excluded, if admitted, would have shown that the insured purposely and intentionally allowed this policy to

lapse (p. 65). The refusal to admit the evidence deprived the defendant of a piece of evidence material to its defense, and operated to prejudice the minds of the jury, and prevented the defendant from having a fair trial.

IV.

The Court erred in refusing to charge the jury as requested and as set forth in our foregoing assignments of error, numbered V, VI, VII, VIII, IX, X, and each of them. The charges so requested, and each of them, correctly stated the law, as shown by the authorities cited under our Point II, and as hereinafter cited; and although the Court partially covered some of the same points by some parts of its subsequent charge, such parts were incomplete, and so intermingled with other and erroneous statements of the law as to destroy the force of that which was correct, and to mislead the jury, and to deprive the defendant of a fair trial. The requests of defendant being correct, it was entitled to have them given in the language requested.

V.

Our assignments of error numbered XI, XII, XIII, XIV and XV, may also be considered together.

There was absolutely no evidence in the case which would either warrant or justify the Court in suggesting to or instructing the jury, what would be the legal consequence, if the money had been received or retained by the company, or by any of its principal officers authorized to waive the lapse of policy by reason of non-payment in time, and all that was said by the Court on that subject, in each of the charges referred to in these assignments

was misleading to the jury, and had a tendency to furnish them with an excuse for yielding to the prejudice and bias which the entire history of jurisprudence in this class of cases influence juries in favor of claims of this character against corporate defendants.

We have already called the attention of the Court to the entire evidence bearing upon this question of payment or tender of the money, up to the point where plaintiff rested. The additional testimony, disclosed at later stages of the case, consists of the following:

1. The application, which constitutes a part of the contract between the parties, found in the record between pages 76 and 77, containing all the warranties and provisions quoted in our "Statement of the Case," and the express covenant on the part of the insured that "*the* "*policy issued upon this application shall become null* "*and void if the premium thereon is not paid as therein* "*provided.*" This was one of the absolute conditions of the contract, and is followed by the provision in the policy, "*that no alteration or waiver of the conditions of this* "*policy shall be valid unless made in writing* at the *office* "*of said company in San Francisco, and signed by the* "*President or Vice-President, and Secretary or Assistant* "*Secretary.*"

There is no pretense that any such waiver was ever so made.

2. Plaintiff in her reply claims (p. 33) that *at* the expiration of the thirty days grace defendant waived the payment of the second premium as to time when it should be made, and specially authorized and requested the insured to pay the same during the month of October, 1890.

We suppose it was in support of this averment that she introduced Mr. Frost's letter of October 23d, (Plff's. Ex. c. p. 72.) But that letter is not written "at the office of the company in San Francisco," or by any of the officers named in the policy as alone having authority to waive any of the conditions of the contract; does not purport to be a waiver, and is not even an invitation or request to pay the premium, or a promise to receive it. The most favorable construction that can be given to it is that it is a notification that the premium has not been received, and a request to be notified of the intentions of the insured—with an inference that some action might yet be taken to protect the interests of the insured. What action could be so taken, and which the writer of the letter evidently desired to have taken, is apparent from the testimony of Mr. Frost. At page 95 he testifies that he was authorized to write letters concerning premiums overdue, *but not to receive them.* At pages 106–7 he testifies that he received the money which was paid to him October, 31st from the Paying Teller of Ladd & Tilton, and on the same day communicated with Mr. Nixon on the subject, by letter addressed to him immediately after the receipt of the money, which letter was mailed through the regular channel, post-paid, which letter was dated October 31st, 1890, and reads as follows: (pp. 108-9.)

"Thomas L. Nixon, Esq., Tacoma, Washington :

" Dear Sir:—I have this day received, through Messrs.
" Ladd & Tilton, the sum of $517.80, which I hold in
" trust for you. Kindly have the enclosed blank properly
" filled out by yourself and Dr. McCoy or Dr. Allen, and
" return to this office, on which they will be submitted to

" the company, and if approved I will receive the amount " as payment of second annual premium due September " 1st and now lapsed for non-payment, and send you " Company's receipt for the same."

"Yours very truly, Edward C. Frost."

The blanks enclosed, the witness testifies (p. 109) were: One to be signed by Mr. Nixon, declaring himself to be in good health and that he desired to be reinstated; and one to be filled out by the medical examiner, stating that he was then in perfect health, or in as good health as at the time of the application. He further testifies (same page) that these blanks were never filled out and returned, or the request contained in the letter complied with. No application was ever made for restoration of the policy, or proof of good health (p. 110.)

This testimony shows clearly the inducement for, and the intent of the letter of October 23; and as clearly that there was no promise to receive it, nor when paid, any acceptance of it as payment of the premium.

Even if there had been such a promise or such an acceptance of it by Mr. Frost, it would not have been binding upon the company.

> *Lantz* vs. *Vermont Life Ins. Co.*, 21 Atl. Rep. 80; *Benecke* vs. *Conn. Mut. Life Ins. Co.*, 105 U. S. 355.

But instead of that, there was no promise, and when the money was sent by telegraph, immediate notice was given that it was not accepted as payment. *The money was never paid to the company,* but remained in the hands of Ladd & Tilton, and was subsequently placed to the credit of Mrs. Nixon at her call (p. 110).

The letter of October 31st above quoted was addressed to Mr. Nixon, with whom alone all dealing had been had up to that time, and from whom Mr. Frost supposed the money to have come. To it no reply was made until December 22d, when Defendant's Exhibit No. 1 (p. 75) was written by Mrs. Nixon, and on the following day received by Mr. Frost (p. 111). This was responded to by Mr. Frost, who was then for the first time brought into correspondence with Mrs. Nixon on the subject, on December 26, 1890 (pp. 111-112). This letter explained to Mrs. Nixon very fully the situation and what was necessary to be done, and wound up by saying that if, in view of the situation, she desired to have the deposit returned, it would be done at once. (See Deft's Exhibit No. 2, pp. 78-79.) No respanse was made to that letter, but the money still remained in the bank (p. 112). On April 30th, 1891, Mr. Frost, having learned of Mr. Nixon's death, deposited the money with Ladd & Tilton, directly to the credit of Mrs. Nixon (p. 112), and immediately advised Mrs. Nixon of the fact (p. 115, and Defendant's Exhibit No. 4, pp. 77-78). On the following day he took out from the bank a certificate of deposit for the amount, payable to the order of Mrs. T. L. Nixon, a copy of which is given in the record on page 114, and enclosed the same in a registered letter to Mrs. Nixon (p. 113, and Defendant's Exhibit No. 3, p. 77), which was returned unopened, and marked refused by Mrs. Nixon, which was produced by the witness himself on the stand (p. 113), and the money still remains in the bank on deposit as the witness placed it (p. 115). During the interim between the time the money was received by Mr. Frost, and sub-

sequently deposited to the credit of Mrs. Nixon, it stood in the bank to the credit of Mr. Frost (p. 117–118). The witness was in the habit of making monthly reports, and remitting the balance due, to the company (p. 122). But this money was never accounted for to the company, or remitted to it (pp. 123–124).

This constitutes the whole evidence on the subject, and we repeat that there was nothing in the whole case to justify the Court in giving any instructions as to what was the legal effect of the receipt and retention of the money by the company, and that such instruction was misleading, and tended to prevent the defendant from having a fair trial. The receipt and retention of the money by the agent under the circumstances disclosed by this testimony was not equivalent to the receipt and retention thereof by the company, and it was error for the Court to give any instruction which would bear that construction. Even if the company had received and retained it in the same way and under the same circumstances, it would not have operated as a waiver of the lapse of the policy, it was error for the Court in its instructions to use language which could be so construed.

VI.

So also, our Assignments of Error numbered XVI and XVII may be considered together. We have already, under our Points II and V, discussed all the evidence in the case, upon which a verdict could be founded, or a judgment given, and it would but cumber the record to repeat it here. We have also, under the same points, cited authorities from the highest courts in the land, which in every case like this stand without conflict so far

as we have been able to discover, which show that under the facts of this case, and the law applied to such facts, the verdict is contrary to the evidence, and against law, and the judgment founded thereon is contrary to law. We rely upon those authorities in support of this point, as if here repeated, and add a few others bearing upon incidental points arising hereunder.

The verdict is against the law as laid down by the Court in this case, in all the parts of its instructions except those to which we have here excepted, and for which there was no warrant in the evidence.

It was competent for the parties to make a contract containing these provisions and under the facts of this case, as shown at this or any other stage of the proceedings, there was no waiver of these provisions.

Ronald vs. Mut. Res. Fund Life Assn., 30 N. E. 739;

Attorney General vs. Ins. Co. 82 N. Y. 172-190.

In *D'Orlu* vs. *Bankers' and Merchants' Mutual Life Ass'n of the United States*, (46 Fed. Rep. 355) the Honorable the Circuit Court for this District held that under the Civil Code of California, Section 2611, which provides that an insurance policy may declare that a violation of specified provisions thereof may avoid it, a tender of the premium, together with all other sums due on the policy, will not prevent a forfeiture of the policy for a previous failure to pay the premium when due, and fortifies its decision by a citation of the decisions of the Supreme Court already cited by us, and others.

The contract in this case, taken as a whole, did contain

just that provision, and the case cited is directly in point here; for the most that can be made out of the evidence in regard to payment is that it was a tender made long after the forfeiture had actually taken place, and never accepted, or brought home to the company, or to any officer having authority to waive the forfeiture.

Neither sickness or disability would excuse, or the usage of giving grace waive the forfeiture.

> Thompson vs. Knickerbocker L. I. Co., 104 U.S. 252.

The insured is presumed to have read his application and to be cognizant of the limitation therein contained as to the policy being void if premium is not paid.

> N. Y. L. I. Co. vs. Fletcher, 117 U. S., 519;
> Fletcher vs. N. Y. L. I. Co., 11 Fed. Rep. 77.

And this and all like provisions of the contract are binding upon the beneficiary.

> Cooper vs. U. S. M. B. Ass'n., 30 N. E. 833;
> Suggs vs. Traveller's Ins. Co. 9 S. W. 676;
> Reddlesberger vs. Hartford Co., 7 Wall. 386;
> Laughlin vs. Union C. L Co., 11 Fed. 280;
> Caffrey vs. Hancock N. Y. I. Co. 27 Fed. 25;
> State Ins. Co. vs. Steffels 29 Pac. Rep. 479;
> State vs. Phœnix, 47 Fed. 863.

If ever there was a case to which the language of the Supreme Court of the United States, and of the Circuit Courts of Colorado and California, from which we have quoted and to which we have referred, would apply, this would seem to be that case; and we submit that under

every rule of law applicable to the facts in this case, the judgment of the Court below should be reversed, the verdict set aside, the case be remanded with instructions to the Court below to enter judgment for the defendant below, (plaintiff in error here) dismissing the action, with costs.

CHAS. N. FOX,

Attorney for Plff. in Error.